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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF FLORIDA

BRIEF OF THE UNITED STATES IN RESPONSE TO DEFENDANT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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INTRODUCTION

This case involves the respective rights of the State of Florida and the United States in the natural resources of the seabed adjacent to the State's coasts, in both the Atlantic Ocean and the Gulf of Mexico. The facts are set forth at pages 2 through 6 of our brief in support of the United States' exceptions to the Report of the Special Master. In this brief we respond to the State's brief in support of its exceptions to that Report.

In previous litigation between these parties, this Court determined that the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, grants the State ownership of

the resources of the seabed within three geographic miles of its coastline along the Atlantic Ocean, and within three marine leagues of its coastline along the Gulf of Mexico. *United States* v. *Florida,* 363 U.S. 121; *United States* v. *Louisiana,* 364 U.S. 502.

In this litigation the State asserts that congressional approval of its 1868 constitution effected a grant to the State of proprietary rights in all resources of the seabed within its historic boundary which, the State claims, lay seaward of the maximum grants of three geographic miles and three marine leagues under the Act. The Special Master, relying upon *United States* v. *California,* 332 U.S. 19, and several subsequent tidelands decisions of this Court, held that the State possessed no proprietary rights in the seabed prior to enactment of the Act (Report, pp. 8–11). The Special Master further determined that the State's historic boundary did not, except in the area between the Marquesas Keys and the Tortugas Islands, lie substantially seaward of the line marking the outer limits of the State's Submerged Lands Act grant (Report, pp. 21–32, 32–36) and that the State, by constitutional amendment, has in any event relinquished its claim to the seabed seaward of those limits (Report, pp. 11–18). The Special Master therefore concluded generally that the State's rights in the resources of the seabed adjacent to its coast are limited to those conferred by the Act. The State excepts (Br. 7–31) to this conclusion and to the determinations on which it is based.

Previous litigation had left unresolved two important questions pertaining to the proper application of the Act to the particular circumstances of this case. (1) The seabed rights granted to the State by the Act extend three marine leagues into the Gulf of Mexico but only three geographic miles into the Atlantic Ocean; the Act, however, does not define the dividing line between those two bodies of water. The Special Master, accepting the views of geographers, cartographers, historians, and explorers, determined that the dividing line between the Atlantic Ocean and the Gulf of Mexico runs due north from Cuba to the Tortugas Islands and thence generally northeastwardly through the Florida Keys to the mainland (Report, pp. 18–21). The State excepts to this determination, contending (Br. 50–57) that the Atlantic Ocean ends at the southern terminus of Key Biscayne, and that all waters southwest of that point lie in the Gulf of Mexico. (2) The Special Master also fixed the State's coastline for purposes of the Act. The only coastline in dispute was that along the Gulf of Mexico between the Tortugas Islands and Cape Romano. The Special Master rejected the State's contention that the large body of water designated by the State as Florida Bay is an historic bay, but he determined that a small portion of those waters, lying to the east of a line running from the East Cape of Cape Sable to Knight Key, is a juridical bay under the Convention on the Territorial Sea and the Contiguous Zone; the Special Master determined that that juridical bay constitutes inland waters of the State and that the

seaward limit of those inland waters marks the State's coastline for purposes of the Act (Report, pp. 36–47, 52–54). The State excepts to the Special Master's finding that none of the waters constitute an historic bay (Br. 31–50); in the alternative, the State contends that the Special Master should have located the closing line of the juridical bay, and therefore the State's coastline, further west (Br. 57–58).

ARGUMENT

I

THE STATE'S RIGHTS IN THE RESOURCES OF THE SEABED ADJACENT TO ITS COASTS ARE LIMITED TO THOSE CONFERRED BY THE SUBMERGED LANDS ACT

A. THE STATE POSSESSED NO RIGHTS IN THE RESOURCES OF THE SEABED PRIOR TO THE ENACTMENT OF THE SUBMERGED LANDS ACT

Following the Civil War, the rebel States were readmitted to representation in Congress only upon congressional approval of their new constitutions. See Acts of March 2, 1867, 14 Stat. 428, and March 23, 1867, 15 Stat. 2. The new constitution of the State of Florida was approved by Act of June 25, 1868, 15 Stat. 73. Included in that constitution was a description of the State's boundary. Although, as we show below (pp. 8–16, *infra*), the State now exaggerates the seaward reach of that boundary, the Special Master found (Report, pp. 23–24), and we concede, that between the Tortugas Islands and the Marquesas Keys the State's 1868 boundary did in fact lie more than three geographic miles seaward of its coastline along the Atlantic Ocean and more than three marine leagues seaward of its coastline along the Gulf of Mexico. In

other words, in that area the State's historic boundary lay seaward of the line marking the outer limits of the State's Submerged Lands Act grant.

The State contends here (Br. 7–17) that in addition to the proprietary rights conferred by the Act it is also entitled to ownership of that portion of the seabed lying seaward of the three-mile or three-league belt conveyed by the Act but within the State's historic boundary. The State's theory is that congressional approval of its 1868 constitution effected a grant to it of proprietary rights in the seabed within that boundary.

This claim is essentially indistinguishable from that made by the State of California in *United States* v. *California,* 332 U.S. 19. California's 1849 constitution had fixed its boundary in the Pacific Ocean three miles seaward of the low-water mark, and that constitution was ratified upon California's subsequent admission to the Union. Act of September 9, 1850, 9 Stat. 452. This Court nevertheless concluded that the United States, and not California, was entitled to the natural resources of the seabed within that three-mile belt, reasoning that "national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward [of the low-water mark]" (332 U.S. at 36). This determination of the paramountcy of national rights in the offshore seabed was explicitly reaffirmed in *United States* v. *Louisiana,* 339 U.S. 699, 704, and *United States* v. *Texas,* 339 U.S. 707, 719. In all three cases those States, like Florida here, asserted historic maritime boundaries.

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But as the Court noted in its *Louisiana* decision (339 U.S. at 704):

> * * * [T]he issue in this class of litigation does not turn on title or ownership in the conventional sense. * * * Protection and control of the [marginal sea] are * * * functions of national external sovereignty. * * * The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

Moreover, the Court in those cases was not concerned merely with the three-mile marginal belt. Louisiana claimed a boundary 27 miles seaward of the low-water mark, and Texas claimed a boundary three marine leagues from shore. But the Court held that the nation's interests and rights did not terminate at the edge of the three-mile belt (*United States* v. *Louisiana, supra,* 339 U.S. at 705):

> * * * The matter of state boundaries has no bearing on the present problem. If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea.

These decisions require rejection of Florida's claim that mere congressional approval of its constitution effected an implicit grant of proprietary rights in the seabed within its historic boundary. Although such

approval "authorized [the State] to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government's paramount rights in and power over this area." *United States* v. *California, supra,* 332 U.S. at 36.[1]

Moreover, the State has failed to adduce any evidence showing that Congress in 1868 made an express grant of proprietary seabed rights. Congressional approval of the constitutions of the formerly rebel States was required to ensure the establishment in each of those States of a republican form of government in conformity with the federal Constitution, including the Fourteenth Amendment. In the Act of June 25, 1868, Congress approved the constitutions of Florida and five other states, and it appears from the face of the Act that the concern of Congress was to ensure that the six states had "framed constitutions of State government which are republican." 15 Stat. 73. Congressional approval of Florida's 1868 constitution therefore indicated nothing more than Congress' considered judgment that the system of state government established thereunder complied with the federal Constitution. Of course, in making that judgment Congress also incidentally approved the State's constitutional boundaries. See *United States* v. *Florida, supra,* 363 U.S. at 128. But as the Special Master observed, "no language in either the Acts of 1867 or the Act of

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[1] The State's general assertion (Br. 7–15) that the *California* decision does not apply here is without legal basis. This Court has expressly held that the underlying legal doctrine of the *California* decision survived enactment of the Submerged Lands Act and is applicable to all coastal States. See *United States* v. *Louisiana*, 363 U.S. 1, 6–7.

1868 even remotely suggest[s] that Congress by the Act of 1868 intended to make a grant to the State of the seabed within those boundaries or that it did in fact do so" (Report, p. 8).

Accordingly, the State had no proprietary rights in the seabed adjacent to its coasts prior to the enactment of the Submerged Lands Act, and the only rights it now possesses are those conferred by that Act.

B. THE SPECIAL MASTER CORRECTLY DETERMINED THE STATE'S HISTORIC BOUNDARY

The proper location of the State's historic boundary is relevant to this litigation only if this Court determines that the State possesses proprietary rights in the resources of the entire seabed landward of that boundary. If, as we have argued above (pp. 4–8, *supra*), the State's seabed rights derive solely from the Submerged Lands Act, the historic boundary is relevant only to the question whether the State qualifies for the maximum Submerged Lands Act grant of three marine leagues in the Gulf of Mexico. That question, however, is not at issue here; we concede that in the Gulf of Mexico, as defined by the Special Master (see pp. 19–20, *infra*), the State is entitled to the maximum three-league grant provided by Section 2(b) of the Act.[2] Thus if this Court agrees with the Special Master that the State's seabed rights derive solely from the Submerged Lands Act, it need

[2] If, however, this Court determines, contrary to the finding of the Special Master, that the large body of water designated by the State as Florida Bay constitutes an historic bay (see pp. 21–25, *infra*), the State would be entitled under the Act only to a three-mile grant seaward of the closing line of that bay, for the State does not claim an historic boundary seaward of that closing line.

not consider the actual extent of the State's historic boundary.

Furthermore, as we show below (pp. 16–19, *infra*), the State has amended its constitution to fix its boundary at the line that marks the outer limits of its Submerged Lands Act grant and therefore has abandoned any claim to ownership of the seabed seaward of those limits. But we now show that the Special Master in any event correctly determined that the State's historic boundary did not, except in the area between the Marquesas Keys and the Tortugas Islands, extend substantially beyond the outer limits of the State's grant under the Submerged Lands Act.

1. *The State's historic boundary on the Atlantic Ocean between St. Mary's River and the Lake Worth inlet ran along the coastline*

The State's eastern boundary under its 1868 constitution ran "down the middle of [St. Mary's River] to the Atlantic Ocean; thence southeastwardly along the coast to the edge of the Gulf Stream" (U.S. Ex. 6). This boundary call admittedly is logically incomplete. The description "down the middle of said river to the Atlantic Ocean" calls in plain terms for a boundary that stops at the margin of the ocean; similarly, the description "southeastwardly along the coast" calls for a boundary running along the coastline and not offshore. However, the Gulf Stream never touches the shore; the boundary must at some point leave the coastline in order to meet the Gulf Stream's edge. The problem confronting the Special Master was to determine where the constitutional draftsmen had intended the boundary to leave the shore.

The State's eastern coastline runs generally southeastwardly from St. Mary's River to a point approximately one mile north of the Lake Worth inlet, and then takes a general southwestwardly turn. The Special Master determined that the State's historic boundary left the coastline at that point and continued in a southeastwardly direction until it reached the western edge of the Gulf Stream, which in that area follows the 100-fathom contour parallel to and approximately three miles from the coast (Report, pp. 21–22).

The State contends (Br. 18–22) that the Special Master should have found that the boundary ran into the ocean out to the 10-fathom contour at the mouth of St. Mary's River, and then along the 10-fathom contour to a point east of the Lake Worth inlet, and then due east to the Gulf Stream at the 100-fathom contour.

We see no basis for construing the boundary as extending into the ocean at the mouth of St. Mary's River. The construction urged by the State is the same as that urged by the State of Louisiana, and rejected by this Court, in a virtually identical context. Louisiana's historic boundary ran "along the middle of the [Iberville River], and lakes Maurepas and Ponchartrain, to the Gulf of Mexico," and Louisiana contended that the boundary extended at that point into the Gulf of Mexico. This Court disagreed, noting succinctly that "[t]he boundary line is drawn * * * '*to* the Gulf of Mexico,' not *into* it * * *." *United States* v. *Louisiana,* 363 U.S. 1, 67 (emphasis in original). The same result is appropriate here: the boundary runs "*to* the Atlantic Ocean" and then

"*along the coast,*" and this description is not compatible with a boundary running *into* the Atlantic Ocean and then along the 10-fathom contour.

Moreover, the State's contention is not even supported by its own evidence. The State's only witness on this point was an aviation navigator who testified that the boundary call "to the Atlantic Ocean" should be construed as describing a boundary extending into the ocean only so far as the last sea buoy off the mouth of St. Mary's River (Tr. 306); he conceded that this buoy was some 5 miles landward of the 10-fathom contour claimed by the State as its boundary (Tr. 574). The witness did not testify concerning the connecting link between the 10-fathom contour and the 100-fathom contour that is necessary under the State's theory.

We believe that the Special Master's determination of the State's eastern historic boundary is correct. It adheres to the literal meaning of the phrase "to the Atlantic Ocean" and "along the coast," and it complies with the call's "southeastwardly" directive.

2. *The State's historic boundary on the Gulf of Mexico ran along a line three marine leagues seaward of the coastline, with a southeastwardly connecting link between the Tortugas Islands and the Marquesas Keys*

The State's historic boundary in the Gulf of Mexico between the Tortugas Islands and the mainland is described in its 1868 constitution as running from the Tortugas "northeastwardly to a point three leagues from the mainland" (U.S. Ex. 6). The Special Master determined that this boundary ran along a line three marine leagues from the coastline, with a southeastwardly

connecting link from the Tortugas to the Marquesas Keys (Report, pp. 24–31). The State contends (Br. 22–28) that the boundary call instead describes a line running due northeast from the Tortugas to Cape Romano on the mainland—a contention that, if accepted, would result in the inclusion within the State's historic boundary "of a very large roughly semicircular area of comparatively deep water of the continental shelf in the Gulf of Mexico" (Report, p. 26).

The State's contention rests principally upon the mere claim that the call's "northeastwardly" directive necessarily requires a straight line running due northeast. That claim was fully and properly refuted by the Special Master (Report, pp. 25–26):

> * * * The term "northeastwardly" does not indicate a specific direction as may the more precise term "northeast". On the contrary, "northeastwardly" merely indicates a general direction which may be anywhere between north and east, depending upon other factors such as any relevant meets and bounding features which may be specified or implied. Here only one meet is specified, the Dry Tortugas Islands. The other end of this segment of the boundary, a "point three leagues from the mainland", is indefinite since it may be located at any place on the outer line of the three-league belt of marginal sea lying along the coast of the mainland. We must, therefore, look elsewhere for light on the intended location of this portion of the boundary.

The State of Florida points to the physical fact that the western portion of the boundary contended for by the United States actually

runs southeastwardly rather than northeastwardly and does not take a northeasterly course until it reaches the vicinity of Boca Grande Key. This is quite true, but I do not believe that the term "northeastwardly", as here used, is to be given so restricted a meaning. On the contrary, as I have already suggested, I think it is intended to indicate merely the general direction of this section of the boundary taken as a whole. In this broad sense the line contended for by the United States does run northeastwardly. Both Cape Sable and Cape Romano, the termini contended for by the United States and the State, respectively, are in fact situated north and east of the point of beginning, the Dry Tortugas. A consideration of other language in the 1868 Constitutional boundary description fortifies this view. Thus the line along the Florida Reefs and to the Dry Tortugas is defined by the 1868 Constitution as running "southwestwardly" whereas the western end of the line actually runs northwestwardly. But the fact remains that the Dry Tortugas are in fact located south and west of Fowey Rocks so that the line connecting them may fairly be said in a general sense to run southwestwardly. Likewise the line defining the boundary along the Gulf coast of the mainland north of the area here under discussion is defined as running "northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river". A long section of this line runs northeastwardly and another section southwestwardly but the mouth of the Perdido river is unquestionably north and west of Cape Sable and Cape Romano and the line as a whole may, therefore,

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> fairly be described as running "northwestwardly." I am satisfied, therefore, that the use of the term "northeastwardly" does not eliminate the possibility of a boundary which in certain places deviates from that general direction so long as one terminal point is definitely north and east of the other.

We add only that if the State's constitutional framers had intended a straight line running due northeast, they could have easily described such a line. See p. 30 of the Report of the Special Master in *Michigan* v. *Ohio,* 410 U.S. 420 (No. 30, Original).

After concluding that a straight line running due northeast was not mandated by the 1868 constitution, the Special Master proceeded to consider the likely intent of the constitutional framers (Report, pp. 26–27):

> * * * [T]he great weight of the evidence before me, consisting of ancient documents received as exhibits and the testimony of expert witnesses, establishes, and I find, that in 1868 and prior thereto the interests of the State of Florida and its residents in this area were almost entirely limited to the taking of sponges, turtles and fish in the comparatively shallow waters, less than three fathoms deep, adjacent to the Keys and in the channels between them. It appears that in those days activities, other than shipping, in the area of deeper water to the North and West of the Keys were very minimal and the economic interests of southern Florida did not extend seaward into that area to any substantial extent. There is no evidence to indicate, and I do not believe, that the framers of the

> 1868 Constitution gave actual attention to this large area of the Gulf of Mexico or intended to include it within the State boundaries.

We submit that the Special Master properly evaluated the evidence on this point. See, *e.g.,* Tr. 114–130; U.S. Ex. 39, p. 4. Against this, the State offers little more than the fact that its expert witness "*suggest*[*ed*] that Floridians of the period were aware of resources in the deeper waters * * * and *conceivably* had an interest in claiming the area" (Br. 24; emphasis added). That "suggest[ion]" of a merely "conceivabl[e]" interest is not, of course, a sufficient basis for overturning the Special Master's finding, which is based upon the preponderance of the evidence. Moreover, the State's witness in fact conceded that as of 1868 only the shallow waters were of significant economic interest to the State (Tr. 515).

The United States had contended below that, in view of the fact that in 1868 the State would have been interested in claiming only the shallow waters near shore, the boundary should follow the three-fathom and five-fathom contours north of the Florida Keys. These contours lie within three marine leagues of shore throughout most of the disputed waters. The Special Master, however, concluded that the language of the boundary call, read in context, strongly suggests that the framers intended a three-league boundary (Report, pp. 27–28), and we now agree with that conclusion. Moreover, that reading appears to accord with this Court's previous understanding of the location of that boundary. See *United States* v. *Florida,*

supra, 363 U.S. at 129; *United States* v. *Louisiana, supra,* 364 U.S. at 503.

C. IN ANY EVENT, AFTER ENACTMENT OF THE SUBMERGED LANDS ACT, THE STATE RELINQUISHED ANY CLAIM TO THE SEABED SEAWARD OF ITS GRANT UNDER THAT ACT

In 1962, Florida amended its constitution in order to redefine its constitutional boundary. Insofar as is relevant to this litigation, the new boundary is described as running "down the middle of [St. Mary's River] to the Atlantic Ocean, and extending therein to a point three (3) geographic miles from the Florida coast line, meaning the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; thence southeastwardly following a line three (3) geographic miles distant from the Atlantic coast line of the state and three (3) leagues distant from the Gulf of Mexico coast line of the state to and around the Tortugas Islands; thence northeastwardly, three (3) leagues distant from the coast line, to a point three (3) leagues distant from the coast line of the mainland" (Report, p. 16). Under this amendment, the State's maritime boundary runs along the line marking the seaward limit of the State's Submerged Lands Act grant.

The Special Master properly determined that the effect of the 1962 amendment was to relinquish any claim of state ownership of the seabed lying seaward of the Submerged Lands Act grant (Report, pp. 17–18, 28–29). The State concedes (Br. 29) that the 1962 amendment purported to reduce its boundary,

at least in the Atlantic Ocean, but nevertheless contends (Br. 28–31) that the amendment was not effective because it has never expressly been approved by Congress.

It is clear that the States have authority to cede jurisdiction over areas within their boundaries to the United States. See, *e.g., Petersen* v. *United States,* 191 F. 2d 154, 156 (C.A. 9), certiorari denied *sub nom. California* v. *United States,* 342 U.S. 885. Explicit congressional approval of such cessions is not necessary, for "[t]he acceptance by the United States at the time of the power ceded is presumed." *S.R.A., Inc.* v. *Minnesota,* 327 U.S. 558, 563. See also *Mason Co.* v. *Tax Commission,* 302 U.S. 186, 207; *Benson* v. *United States,* 146 U.S. 325, 330; *Fort Leavenworth R.R. Co.* v. *Lowe,* 114 U.S. 525, 528.

Since congressional approval is not required even when the cession of state jurisdiction imposes upon the federal government responsibility for exercising local police powers, that approval is *a fortiori* unnecessary in a case, such as this, where the State is not ceding jurisdiction but only relinquishing an adverse claim that had never been recognized by the federal government. Exclusive rights to the natural resources of the continental shelf have been claimed by the United States since the Truman Proclamation in 1945 (Presidential Proclamation No. 2667, 59 Stat. 884), and, in enacting the Submerged Lands Act, Congress confirmed that claim as to the seabed lying seaward of the three-mile and three-league limits prescribed therein. See *United States* v. *Louisiana, supra,* 363

U.S. at 6–7. That confirmation of federal ownership constituted ample congressional approval, if any were needed, of any subsequent relinquishment of an adverse state claim.

But the State apparently contends that even if it has authority unilaterally to relinquish a claim of seabed ownership, it has no similar authority to reduce its boundary, and that the 1962 constitutional amendment is ineffective insofar as it purports to reduce the State's maritime boundary. But whatever the pertinent considerations may be in other circumstances, there is no apparent legal obstacle to a State's unilateral reduction of its constitutional maritime boundary to or toward the three-mile line recognized by the federal government, in the conduct of its foreign affairs, as the seaward limit of the territorial sea.[3] In pending litigation, the United States has taken the position that coastal states have no right to exercise jurisdiction and control over fishing by foreign vessels and their crews beyond the territorial sea. *United States* v. *Florida and Texas,* No. 54, Original. Thus the United States has an affirmative interest in the relinquishment or nonassertion of state jurisdiction over the high seas and would welcome the voluntary withdrawal of state boundaries back to the three-mile line. Moreover, such unilateral state action would neither infringe upon the interests of other States nor conflict with any known national interest. It therefore seems clear that no practical purpose would be served by requiring congressional consent to or approval of the State's 1962 constitutional amendment as a condition of its effectiveness, and we see no legal basis for denying that amendment full force and effect.

[3] For a discussion of the United States' position with respect to the territorial sea, see 4 Whiteman, *Digest of International Law* 14–137 (1965).

II

THE SPECIAL MASTER PROPERLY DETERMINED THE DIVIDING LINE BETWEEN THE ATLANTIC OCEAN AND THE GULF OF MEXICO FOR PURPOSES OF THE SUBMERGED LANDS ACT

The Submerged Lands Act grants the State seabed rights extending three marine leagues into the Gulf of Mexico but only three geographic miles into the Atlantic Ocean, without precisely defining the line dividing those two contiguous bodies of water. The Special Master determined, in an opinion (Report, pp. 18–21) on which we primarily rely, that Congress intended and understood the dividing line to run due north from Cuba to the Tortugas Islands, and thence generally northeastwardly through the Florida Keys to the mainland. That line is the one formulated by the International Hydrographic Bureau and adhered to by geographers and cartographers. See Tr. 149; U.S. Ex. 63. It is also the line that historians, explorers, and other authors have long referred to as the maritime border between the two seas. See U.S. Exs. 51–53, 69.

The State urges (Br. 50–57) that the Special Master ignored "overwhelming evidence" (Br. 51) that the Straits of Florida—the waters lying to the north of Cuba and to the south of the Florida Keys and

mainland—are part of the Gulf of Mexico; according to the State, the Atlantic Ocean ends at the southern terminus of Key Biscayne. But the only evidence of substance presented by the State related to the views of marine geologists concerning the topography of the sea floor and the morphology of the coast. Since those views evolved from bathymetric and other findings made long after enactment of the Submerged Lands Act (see Tr. 472), they can shed no light upon the congressional intent. The Special Master's determination reflects the reasonable judgment that Congress contemplated and intended the dividing line designated and internationally agreed upon by geographers, cartographers, and historians at the time of enactment.

But even if, contrary to accepted canons of statutory interpretation, the statutory dividing line is to be fixed in accordance with current knowledge and opinion, rather than that prevailing at the time of enactment, the line fixed by the Special Master is nevertheless proper. Although the findings of marine geologists have undoubted scientific interest and value, those findings have not persuaded geographers and cartographers to withdraw their designation of the Straits of Florida as an arm of the Atlantic Ocean for map-making and other geographic purposes. See Tr. 149; U.S. Ex. 63. It is, of course, maps and geographic writings which supply the basis for the generally understood meanings of the terms "Atlantic Ocean" and "Gulf of Mexico", and it is to that common understanding that the nontechnical phrasing of the statute appeals.

III

THE STATE POSSESSES NO SUBSTANTIAL INLAND WATERS BETWEEN THE TORTUGAS ISLANDS AND CAPE ROMANO

The seabed rights granted by the Submerged Lands Act are measured seaward from the "coast line", which Section 2(c) of the Act defines as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." The State claims (Br. 31–50) that a line running due northeast from the Tortugas Islands to Cape Romano marks the "seaward limit of [its] inland waters," on the theory that the waters lying east of that line, between the mainland and the Florida Keys, comprise an historic bay. Alternatively, the State claims (Br. 57–58) that the seaward limit of its inland waters in that area is marked by a line drawn from the Spanish Banks low-tide elevation, two miles northeast of Big Spanish Key, to the East Cape of Cape Sable, on the theory that the waters lying east of that line comprise a juridical bay. As we now show, both claims are insubstantial.

A. THE WATERS LYING EAST OF A STRAIGHT LINE RUNNING FROM THE TORTUGAS ISLANDS TO CAPE ROMANO DO NOT COMPRISE AN HISTORIC BAY

The Special Master correctly determined that the State, in order to prove the existence of an historic bay, must show (1) that it has exercised an open, notorious, and effective sovereign authority over the waters of the bay, not merely with respect to local citizens but as against foreign nationals as well, (2)

that this authority has been exercised for a considerable period of time, and (3) that foreign nations have acquiesced in this exercise of authority (Report, p. 41). See *United States* v. *California,* 381 U.S. 139, 172; *United States* v. *Louisiana,* 394 U.S. 11, 23–24, n. 27. The State has failed to make either of these required showings with respect to the area in question.

We review each of the State's arguments in turn. First, although it is not dispositive of the State's claim, it is significant that the State has failed to establish that the waters here in question even constitute an historically identifiable area. Although the State attempts to show (Br. 37–39) that the area in question has long been designated "Florida Bay," the United States established that that designation was shown on no maps prior to 1868 (Tr. 136) and was unknown to explorers prior to the 1850's (Tr. 141), that the name "Florida Bay" is omitted from the charts and text of a comprehensive history of the State written by one of the State's principal witnesses (Tr. 512–513), and that once that name came into popular use it referred only to the waters east of "an imaginary line drawn from East Cape, on Cape Sable, southward to Vaca Key" (Tr. 144; U.S. Ex. 54), *i.e.,* to a body of water considerably smaller than that claimed by the State in this litigation.[4] These con-

[4] Moreover, the area claimed by the State as an historic bay is not a true geographic bay, for it is formed not by an indentation in the mainland but rather by the mainland and a string of islands, between some of which there are wide, navigable water gaps (Tr. 145–146).

siderations reinforce the Special Master's conclusion (Report, pp. 24–31; and see pp. 11–16, *supra*) that the State's 1868 constitution did not include the area now referred to by the State as "Florida Bay" within the State's historic boundary. There has, therefore, been no historic claim to these waters.

The State next asserts (Br. 40), without any attempt at proof, that the area here in question was ceded to the United States by Spain in 1821; there is no evidence that these waters were either possessed by Spain or ever ceded by her to the United States. The State also relies (*ibid.*) upon federal action in arresting foreign turtlers in unspecified Florida waters during the 1820's; the evidence shows, however, that turtling at that time was conducted in the shallow waters near the shore, not in the comparatively deep waters claimed by the State (U.S. Ex. 39, p. 4).

As evidence of foreign acquiescence, the State offers only an 1831 British request "for permission to allow English fishermen to fish in Florida waters" (Br. 40). However, the State's own witness was unable to show that this or any other such request by a foreign government referred to the waters here in question (Tr. 482–486). Moreover, during the 1830's the State claimed exclusive fishing rights only within a cannon shot, or three miles, of shore (Fla. Ex. 76, p. 4), so that the British request—and also the fisheries act enacted by the Florida legislature in response to that request (Br. 42)—evidently concerned only waters within the three-mile territorial sea. Similarly, there is no evidence that the State's various other fisheries

acts (Br. 42–43, 44–46) were intended to regulate fishing beyond three miles or, at most, three leagues of shore. And the fact that military fortifications were constructed on shore (Br. 43–44) clearly has no relevance to the State's claim here.

Although the State now asserts (Br. 46–48) that its current fisheries legislation applies to the entire body of water that it claims as an historic bay, the State's own witness—the Executive Director of the Florida Department of Natural Resources—conceded that this position was first taken by the State in 1968, and that prior to that time the State had asserted fisheries jurisdiction only within three leagues of shore (Tr. 548–549). He also testified that the State had never seized any foreign vessel more than three leagues from shore (Tr. 551). Moreover, the State's expert witness on the history of the State testified that he knew of no historical evidence of any effort by the State to exclude foreign fishing vessels from the expanded area it now claims (Tr. 510–511).

The only other evidence submitted by the State (Br. 48–49) pertained to offshore leases in the disputed area granted by the State to certain private individuals in 1944, 1949, and 1951, the last of which expired in 1964. The Special Master properly evaluated this evidence by observing (Report, p. 46):

> * * *[T]he leases were given only nine years, at the earliest, before the enactment of the Submerged Lands Act and * * * [therefore] do not disclose a usage sufficiently remote in time * * *. Nor do I think that they afford evidence of a use adverse to foreign nations in

> light of the accepted view in recent years that maritime nations have special rights in the bed of the continental shelf off their coasts.

Moreover, the United States has distributed to foreign governments, in response to their requests, maps showing that the disputed waters lie outside the United States' territorial sea (see U.S. Exs. 101, 102, 103, and 104) and from before enactment of the Submerged Lands Act has affirmatively disclaimed any title to the waters in question as an historic bay (see U.S. Exs. 97, 105, and 106). In view of this consistent history of federal disclaimer, the State bore the heavy burden of proving beyond a reasonable doubt that it had traditionally exercised sovereign authority over the disputed waters, and that foreign governments had acquiesced in that exercise of authority. See *United States* v. *California, supra,* 381 U.S. at 175; *United States* v. *Louisiana, supra,* 394 U.S. at 77. The Special Master correctly concluded that the State failed to carry that burden.

B. THE WATERS LYING EAST OF A STRAIGHT LINE RUNNING FROM THE SPANISH BANKS LOW-TIDE ELEVATION TO THE EAST CAPE OF CAPE SABLE DO NOT COMPRISE A JURIDICAL BAY

The Special Master determined that the waters lying east of a straight line running from Knight Key to the East Cape of Cape Sable comprise a juridical bay under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. (Part 2) 1606, and therefore that the line constitutes the seaward limit of internal waters. The State agrees that a juridical bay exists but contends (Br. 57–58) that

the southern terminus of its closing line is further west, at the Spanish Banks low-tide elevation two miles northeast of Big Spanish Key.

We have shown, at pages 7 through 15 of our brief in support of the United States' exceptions, that the Special Master erred in finding a juridical bay. We undertake to show here only that, assuming *arguendo* the existence of such a bay, the closing line proposed by the State is nevertheless inappropriate.

The theory on which the Special Master apparently proceeded in finding a juridical bay was that the Florida Keys out to Knight Key are "so closely aligned with the mainland as to be deemed a part of it." *United States* v. *Louisiana, supra,* 394 U.S. at 67, n. 88. In the proceedings before the Special Master the State did not urge the closing line it now proposes. The Special Master nevertheless considered and rejected that closing line "because of the existence of a gap in the chain of the Keys just west of Knight Key, through which gap passes the Moser Channel between the Straits of Florida and the Gulf of Mexico with navigable depths of water of from 10 to 15 feet [;] * * * this navigable channel so far separates the lower Florida Keys from the upper Keys as to negate a finding that the former should be regarded as a further extension of the mainland" (Report, p. 47).

The State's position here apparently is that since a federal highway runs from the mainland to Key West, and "ocean-going vessels" (Br. 58) cannot navigate Moser Channel, the entire chain of Keys extending westward to Key West may be treated as

part of the mainland for purposes of establishing a juridical bay under Article 7 of the Convention. The United States, by limiting its territorial sea in this area to a three-mile belt measured from the natural shoreline (U.S. Ex. 101), has, in its dealings with foreign nations, implicitly rejected the State's argument with respect to the significance of highway bridges. Moreover, this Court has held that it is the geographic relationship of an island to the mainland, not the presence or absence of highway bridges, that determines whether the island may be considered part of the mainland under the Convention (*United States* v. *Louisiana, supra,* 394 U.S. at 66):

> * * * whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast.

The islands west of Knight Key cannot be considered part of the mainland under these criteria. As the State concedes (Br. 58), the most seaward of those islands, Key West, is over 100 highway miles from the mainland; and a water gap of more than 5 miles separates Bahia Key, the easternmost of the lower Keys, from Knight Key, the westernmost of the upper Keys. These distances are far too great to permit the lower Florida Keys to be realistically considered part of the mainland. Cf. *United States* v. *Louisiana, supra,* 394 U.S. at 66–67. Similarly, the water channels west of Knight Key, although not deep enough to accom-

modate truly large vessels, are nevertheless navigable by ocean-going fishing vessels; those channels therefore are of sufficient international significance to foreclose treatment of outlying islands as part of the mainland. Finally, the Keys constitute a fringe of islands projecting dramatically away from the mainland coast; their "relationship to the configuration or curvature of the coast" precludes their being considered part of the mainland.

But the closing line proposed by the State is in any event improper, even if the State is otherwise correct in its contention that islands linked to the mainland by a highway may realistically be considered part of the mainland for purposes of Article 7. The maximum closing line permitted by that Article is 24 miles, and the highway upon which the State relies does not pass through any island west of Knight Key from which a 24-mile closing line may be drawn. In an attempt to overcome this difficulty, the State has designated, as the headland of its proposed juridical bay, a low-tide elevation that lies two miles offshore from the nearest true island and more than three miles from the nearest island crossed by the highway. We have serious doubts whether a low-tide elevation may properly be considered the headland of a juridical bay. Cf. Article 4(3) of the Convention, prohibiting the construction of straight baselines to or from low-tide elevations. In any event, the comparatively isolated low-tide elevation chosen by the State in this case is not "so closely aligned with the mainland as to be deemed a part of it"; nor can it realistically be con-

sidered part of the chain of islands that are connected to the mainland by the highway. It cannot, therefore, properly be treated as the headland of a juridical bay. See *United States* v. *Louisiana, supra,* 394 U.S. at 60–66; see also pages 11 and 12 of our brief in support of the United States' exceptions. Indeed, there is no island or low-tide elevation west of Knight Key from which a satisfactory closing line could be drawn under Article 7. See page 10, note 3, of our brief in support of the United States' exceptions.

CONCLUSION

For the foregoing reasons, the State's exceptions to the Report of the Special Master should be overruled.

Respectfully submitted.

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